BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

DENNIS E. MCQUESTEN	)	
Claimant	)	
	)	
VS.	)	
	)	
ELLSWORTH COUNTY	)	
Respondent	)	Docket Nos. 268,194 &
	)	268,195
AND	)	
	)	
EMC INSURANCE COMPANIES	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier requested review of the May 3, 2002 Award of Administrative Law Judge Bruce E. Moore. The Board heard oral argument on November 6, 2002. Gary M. Peterson was appointed as Board Member Pro Tem for the purpose of determining this matter.

APPEARANCES

James S. Oswalt of Hutchinson, Kansas appeared for the claimant. James M. McVay of Great Bend, Kansas appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The Administrative Law Judge (ALJ) determined the claimant made a good faith effort in searching for employment following his termination from employment with respondent. Consequently, the ALJ did not impute a post-accident wage. Instead, the ALJ awarded claimant a work disability utilizing his actual post-accident earnings for the wage loss prong of the two part work disability formula.

The sole issue raised on review by the respondent is the nature and extent of claimant's disability. Specifically, respondent argues claimant should be limited to his functional impairment because he did not seek a job which a vocational job placement expert had determined was available with another employer that would have paid more than 90 percent of claimant's pre-injury average weekly wage.

Claimant notes that he had accepted employment in Florida before he was told the other job might be available; that the job he accepted in Florida paid a higher hourly wage and although it was initially less than a 40-hour a week job it would eventually become full-time. Accordingly, claimant requests the ALJ's determination claimant made a good faith effort to obtain appropriate employment be adopted and the ALJ's Award be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board finds the ALJ's Award should be affirmed.

The Board finds the ALJ's findings and conclusions are accurate and supported by the law and the facts contained in the record. It is not necessary to repeat those findings and conclusions in this Order. The Board approves those findings and conclusions and adopts them as its own.

Claimant's permanent partial general disability is determined by K.S.A. 44-510e(a), which provides, in part:

> Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. **The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.** In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. **An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross**

> **weekly wage that the employee was earning at the time of the injury.** (Emphasis added.)

K.S.A. 44-510e sets forth the formula for determining claimant's permanent partial general disability. But that statute must be read in light of *Foulk*[1] and *Copeland*.[2] In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e (the predecessor to the above-quoted statute) by refusing to attempt to perform an accommodated job, which the employer had offered. And in *Copeland*, the Kansas Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e (Furse 1993), that a worker's post-injury wage should be based upon the ability to earn wages rather than the actual wage being earned when the worker fails to make a good faith effort to find appropriate employment after recovering from the work injury.

> If a finding is made that a good faith effort has not been made, the factfinder *[sic]* will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages. . . .[3]

According to the appellate court decisions, in determining permanent partial general disability, the question is whether the worker has made a good faith effort to find and retain appropriate employment. If the worker has made a good faith effort, then the actual difference in pre- and post-injury earnings is used in the permanent partial general disability formula. If the worker has not made a good faith effort, then a post-injury wage should be imputed. Consequently, workers who are earning less than 90 percent of their pre-injury wage and have acted in good faith are entitled to receive an award for work disability.

The controlling issue is whether claimant refused employment that would have paid more than 90 percent of his pre-injury average weekly wage.[4] This argument is premised upon the assertions of respondent that claimant could have obtained such employment with Pork Packers. But the ALJ noted such work was never offered and, if it had been offered, claimant would have had to ride to work with another individual because of his transportation problems. And there was no indication that individual was willing to provide those rides. The Board further notes that the proposed work at Pork Packers was not within Dr. Pedro A. Murati's permanent restrictions.

---

[1] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[2] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

[3] *Id.* at 320.

[4] See K.S.A. 44-510e(a).

The ALJ determined claimant's permanent partial general disability should not be limited to his functional impairment rating. Instead, the ALJ awarded a work disability. It is undisputed that respondent terminated claimant's employment on July 31, 2001, because it could not accommodate the permanent restrictions imposed by Dr. Murati. Eventually, claimant did find a job that was within his restrictions and that he could perform although it required him to relocate to Florida. The ALJ concluded claimant exhibited good faith in diligently searching for employment following his termination. The Board agrees and affirms.

AWARD

WHEREFORE, it is the finding, of the Board that the Award of Administrative Law Judge Bruce E. Moore dated May 3, 2002, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of July 2003.

_____
BOARD MEMBER

_____
BOARD MEMBER

_____
BOARD MEMBER

c: James S. Oswalt, Attorney for Claimant
James M. McVay, Attorney for Respondent
Bruce E. Moore, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director